TABLE OF AUTHORITIES

	Page
Bowerman v. Hammer, 250 U.S. 504, 39 Sup. Ct. 549, 63 L.Ed. 1113 (1919)	4
Corsicana National Bank v. Johnson, 251 U.S. 68, 40 Sup.Ct. 82, 64 L.Ed. 141 (1919)	4
First National Bank of Cushing, Cushing, Oklahoma, v. Security Mutual Casualty Company v. Robert W. Adams, et al., 431 F.2d 1025 (10th Cir. 1970)	2, 6
Guarantee Company of North America v. Mechanics Savings Bank & Trust Co., 183 U.S. 402, 22 Sup. Ct. 134, 46 L.Ed. 253 (1902)	5
Pichleimer v. United States Fidelity & Guaranty Co., 54 F.2d 1022 (4th Cir. 1932)	5
Swingle v. United States, 389 F.2d 220 (10th Cir. 1968)	3

Note: "A" references in this brief refer to appendix in petitioner's brief.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1172

SECURITY MUTUAL CASUALTY COMPANY,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF CUSHING, CUSHING, OKLAHOMA, a National Banking Association; ROBERT W. ADAMS; ROBERT W. ADAMS, Executor of the Will of Alma M. Blank; FRANK G. BERRY AND GEORGE M. BERRY, Executors of the Will of James E. Berry, deceased; LEVI SWINGLE; ARTHUR BLAINE IMEL; E. L. ROBERTS; D. A. GRIFFIN; AND GEORGE M. BERRY,
Respondents,

BRIEF OF RESPONDENTS, ROBERT W. ADAMS; Robert W. Adams, Executor of the Will of ALMA M. BLANK, deceased; Frank G. Berry and George M. Berry, Executors of the Will of JAMES E. BERRY, deceased; ARTHUR BLAINE IMEL; D. A. GRIFFIN and GEORGE M. BERRY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondents, ROBERT W. ADAMS; Robert W. Adams, Executor of the Will of ALMA M. BLANK, deceased; Frank G. Berry and George M. Berry, Executors

of the Will of James E. Berry, deceased; ARTHUR BLAINE IMEL; D. A. GRIFFIN and GEORGE M. BERRY pray that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on August 20, 1970.

REASONS FOR DENIAL OF WRIT

On behalf of the six respondent directors, ROBERT W. ADAMS; Robert W. Adams, Executor of the Will of ALMA M. BLANK, deceased; Frank G. Berry and George M. Berry, Executors of the Will of JAMES E. BERRY, deceased; ARTHUR BLAINE IMEL; D. A. GRIFFIN and GEORGE M. BERRY, (hereinafter called respondent directors), all who the trial court found free from negligence (A. 41-42), the following arguments and reasons are submitted in support of denying the writ.

First, there are no special or important reasons requiring or necessitating review. In affirming this case the Tenth Circuit concluded it was primarily a "substantial evidence case." *First National Bank of Cushing, Cushing, Oklahoma v. Security Mutual Casualty Company v. Robert W. Adams, et al,* 431 F.2d 1025 (10th Cir. 1970). In the *Cushing* case the circuit court stated at page 1027:

> "The principal issue on this appeal is whether or not the directors had notice of the fraudulent acts of Swingle by reason of their examinations of the bank or by reason of the contents of the reports submitted to the board by the national bank examiners. The appellant bonding company asserts they had such notice long before notifying the bonding company and that the bank directors were negligent to an extent that it is relieved from liability on its bond. Also the

company urges that the bank should be held to have knowledge of the wrongdoing by reason of the contents of its records.

The case thus comes to us basically as a substantial evidence case. The trial court made findings of fact on the three issues referred to above. These findings must, of course, stand unless clearly erroneous. Of equal importance it is for the trial court to draw the inferences from the facts, and again if not clearly erroneous will stand although there be other possible inferences. * * * It found that the directors had no knowledge of the wrongdoing by Swingle and were not put on notice thereof by reason of their examinations nor by reason of the reports made by the national bank examiners. The trial court found that the directors were not negligent in the performance of their duties and that they had no knowledge of the wrongdoing by reason of the bank's own records.

We conclude from our examination of the record that the findings of the trial court are fully supported by the evidence."

This case involved criminal fraud which was the basis of the action by the bank against the bonding company. The former president of the bank, Levi Swingle, was convicted for misapplication of national bank funds in violation of Title 18, U.S.C., Sec. 656. See *Swingle v. United States*, 389 F.2d 220 (10th Cir. 1968). As the *Swingle* case indicated, the criminal fraud involved was based primarily on payment of overdrafts to one particular customer which were never properly recorded on the bank's books. Swingle devised this scheme by the surreptitious manipulation of checks called "cycling" thereby causing the loss to the bank and which was done without the knowledge of the six respondent directors.

True, there was some difference of viewpoint between counsel as to the inferences to be drawn from the evidence, but of the six respondent directors found free from negligence, the records show that they attended meetings regularly and took an active interest in the affairs of the bank. (A. 41-45). *Bowerman v. Hamner*, 250 U.S. 504, 39 Supt.Ct. 549, 63 L.Ed. 1113 (1919). The directors' examination committee conducted periodic examinations of the bank and did not find the scheme; the national bank examiers made three examinations during the period of the scheme and did not uncover the criminal fraud. (A. 43-45). The findings reflected that any comments or criticisms during the examinations were either cleared up or acted upon by the directors. There were comments in certain of the bank examiners' reports concerning various customer checks that were held back pending a compensating deposit, but findings determined that by the time these reports reached the respondent directors, those items had been cleared out of the bank. (A. 42-45). Further, the national bank examiner who supervised the examinations during the check cycling episode did not intend for any comments in his reports to inform or alert the directors to Swingle's fraudulent check scheme. (A. 44-45).

Petitioner suggests that this case contradicts the holding in *Corsicana National Bank v. Johnson*, 251 U.S. 68, 87, 40 Sup.Ct. 82, 64 L.Ed. 141 (1919). We submit the *Corsicana* case rather than being in conflict, concerns a different matter. In *Corsicana* the defendant, a bank officer, "knowingly" approved excessive loans and was dominant in the affairs of the bank. The lower court had directed a verdict for the defendant and the circuit court affirmed. *Corsicana* was reversed on the legal premise

there was sufficient evidence showing the defendant "knowingly" participated in the granting and approval of the excess loans. In the instant case, the former president, Levi Swingle, and vice president, E. L. Roberts, were found liable to the bonding company and judgment entered by the trial court for their participation in the fraud. (A. 51).

Petitioner suggests a conflict with *Guarantee Company of North America v. Mechanics Savings Bank & Trust Co.*, 183 U.S. 402, 22 Sup.Ct. 124, 46 L.Ed 253 (1902). Again, no conflict. In the *Guarantee* case, the president had previous warnings about speculative business activities of a teller and omitted revealing such in an application to the bonding company which was held not consistent with good faith.

In *Picklesimer v. United States Fidelity & Guaranty Co.*, 54 F.2d 1022 (4th Cir. 1932) cited by petitioner, it again involves an untrue application filed by the bank with the bonding company with knowledge of an unreliable, dishonest employee which bars recovery on an action involving that employee. In the instant case, there was no showing of a false application to the bonding company, further the trial court found Swingle to have full confidence of the directors. (A. 28, 43). There was no showing in the instant case that the bank or six respondent directors had knowledge of wrongdoing by Swingle until he confessed on October 13, 1964 and the court so found. (A. 27-29). The trial court found that Swingle had concealed the true facts about the cycled checks from the directors and the bank examiners. (A. 41-42).

We submit the other cases cited by petitioner stand for irrelevant propositions to this issue.

Petitioner argues this is a case involving violations of excess loan laws by the bank and respondent directors but the court found from the evidence these loans were not the fraud or wrongdoing upon which the action was based, but instead a device used by Swingle to hide his prior wrongdoings of which the respondent directors were unaware. *First National Bank of Cushing*, supra, page 1029.

Therefore, it is submitted petitioner should not be afforded review of an "excess" loan question under this record when the trial court found the facts against petitioner and the circuit court, upon review of the record, found the findings were fully supported and affirmed the judgment.

On behalf of the six respondent directors, it is respectfully requested that petition for certiorari be denied.

Respectfully submitted,

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